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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BERT POTTER,

Plaintiff and Appellant,

v.

ALICIA MARTINEZ et al.,

Defendants and Respondents.

B209676

(Los Angeles County  
Super. Ct. No. BC332230)

APPEAL from an order of the Superior Court of Los Angeles County. Ruth A. Kwan, Judge. Affirmed.

David A. Cordier for Plaintiff and Appellant.

F. Adrian Munoz for Defendant and Respondent Alicia Martinez.

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Judgment was entered in this case following the defendants' acceptance of plaintiff Bert Potter's Code of Civil Procedure section 998 offers (998 offers). Although his section 998 offers did not mention prejudgment interest, Potter filed a post-judgment motion seeking to augment the judgment to add prejudgment interest. The trial court denied the motion and Potter appealed. We affirm.

## **Background**

Potter is the owner of the business known as Central Jail Bail Bonds. Defendants Alicia Martinez, Alma Valdez and Rolando Sanchez (collectively "defendants") entered into an agreement with Central Jail Bail Bonds for the issuance of a bail bond to secure Dora Perez's release from jail (the "bail contract"). Under the bail contract, defendants were jointly and severally responsible for damages if Perez did not appear in court when required or if there was a forfeiture of the bail bond.

While the bail bond was in effect, Perez failed to make a court appearance and the court forfeited the bail bond. On October 23, 2002, Potter paid the resulting judgment of \$25,777.15. Potter also incurred related costs and expenses totaling at least \$5,000.00. Defendants refused to pay any amount due under the bail contract. Consequently, Potter sued defendants for, among other things, breach of contract, alleging a minimum of \$30,777.15 in damages. Potter also sought prejudgment interest at the legal rate of interest of 10 percent per annum from October 23, 2002.

More than 10 days prior to trial, Potter served a 998 offer on each of the defendants. The 998 offers were identical except that Potter directed one to Martinez, one to Sanchez and another to Valdez. The offers stated: "Pursuant to the provisions of Code of Civil Procedure section 998, plaintiff Bert Potter hereby offers to settle this action against defendant [Martinez/Sanchez/Valdez] for the sum of \$19,900.00, such sum to be deemed to be the principal amount due to plaintiff as of October 23, 2002, the date plaintiff paid on the forfeiture of the bail bond for defendant Dora Perez, and such amount being the principal amount of a judgment entered in favor of plaintiff and against

said defendant. [¶] Pursuant to the further provisions of Code of Civil Procedure section 998, and if this offer is acceptable by defendant, [Martinez/ Sanchez/Valdez], it must be accepted in writing and signed by counsel for plaintiff/cross-defendant, [Martinez/Sanchez/Valdez], unless at the time of such acceptance said party is not represented by counsel, in which event, the offer may be accepted in writing and signed by the party accepting this offer.”

Each of the defendants accepted Potter’s 998 offer, stating he or she “accepts the offer to compromise pursuant to Code of Civil Procedure section 998 as heretofore set forth.”

Following acceptance of the 998 offers, the trial court entered judgment. The judgment states that defendants accepted Potter’s 998 offers and that judgment was entered against each of the defendants “jointly and severally in the principal sum of \$19,900.00, such sum to be deemed to be the principal amount due to plaintiffs as of October 23, 2002, the date plaintiff paid on the forfeiture of the bail bond for Dora Perez.” The judgment also states that Potter “may be able to file a motion to recover his costs, attorney[’]s fees, and prejudgment interest by way of appropriate memorandum of costs and/or post-judgment motions.” Finally, the judgment also states that it will be “amended to include any costs, attorney’s fees, and/or prejudgment interest that m[a]y be allowed by law, or as may be approved by court order.”

Following judgment, Potter filed a motion for an order augmenting the judgment to include prejudgment interest in the amount of \$10,447.50. Only defendant Martinez opposed the motion. The trial court denied the motion. The trial court’s ruling on the matter stated in its entirety: “The Court finds, as prejudgment interest is an element of damages, *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 830, and ‘should be awarded in the judgment on the basis of a specific request therefor made *before* entry of judgment’, *Id.* (emphasis in original), and the 998 offer ‘settle[d] this action’ and the ‘the sum of \$19,900 . . . being the principal amount of a judgment entered in favor of plaintiff . . .’, the parties intended to settle the action for \$19,900 and exclude

an award of prejudgment interest, *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 677.” The trial court subsequently entered an order denying the motion.

Potter appeals the order denying prejudgment interest.<sup>1</sup>

## Discussion

### 1. Interpretation of the Section 998 Offers

In the absence of any conflicting extrinsic evidence, interpretation of a 998 offer is a question of law that we review de novo. (*Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 183 (*Chinn*).) “We apply general principles of contract law where those principles neither conflict with section 998 nor defeat its purpose.” (*Ibid.*) We construe ambiguities in a 998 offer against the offeror. (*Id.* at p. 185. See also *Berg v. Darden* (2004) 120 Cal.App.4th 721, 727 [“a section 998 offer is construed strictly in favor of the party sought to be subjected to its operation”].)

Section 998 provides that any party to an action “may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time.” (Code Civ. Proc., § 998, subd. (b).) If a party accepts a 998 offer, “the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly.” (Code Civ. Proc., § 998, subd. (b)(1).) “A judgment entered pursuant to the acceptance of a section 998 offer is ‘a stipulated or consent judgment’ that is regarded as a contract between the parties and ‘must be construed as any other contract.’ [Citations.]” (*Chinn, supra*, 166 Cal.App.4th at p. 184.)

The 998 offers at issue here do not mention prejudgment interest let alone state that Potter would seek prejudgment interest in addition to the “principal amount” described in the offers. Similarly, at the hearing on the acceptance of the 998 offers,

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<sup>1</sup> Potter also appealed the trial court’s order denying in part his post-judgment motion for attorney fees. In his Opening Brief on appeal, however, Potter indicated he has abandoned that appeal.

prejudgment interest was neither discussed nor mentioned. Although it could be argued that, because the 998 offers use the phrase “principal amount due to plaintiff as of October 23, 2002,” the 998 offers contemplated an award of prejudgment interest in addition to that “principal amount,” we believe the 998 offers are—at best—ambiguous on that point. Construing this ambiguity against the offeror Potter (*Chinn, supra*, 166 Cal.App.4th at p. 185), we conclude the 998 offers did not contemplate prejudgment interest.

## **2. Prejudgment Interest**

Although the 998 offers are silent on the issue of prejudgment interest, we consider whether Potter may nonetheless recover prejudgment interest as a matter incident to the judgment. We review the trial court’s denial of prejudgment interest under Civil Code section 3287, subdivision (a) de novo. (*Employers Mutual Casualty Co. v. Philadelphia Indemnity Insurance Co.* (2008) 169 Cal.App.4th 340, 347.)

Compromise agreements “‘regulate and settle only such matters and differences as appear clearly to be comprehended in them by the intention of the parties and the necessary consequences thereof, and do not extend to matters which the parties never intended to include therein, although existing at the time.’ [Citations.] Thus they ordinarily conclude all matters put in issue by the pleadings—that is, questions that otherwise would have been resolved at trial.” (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 677 (*Folsom*).) Absent affirmative agreement of the parties, however, a compromise agreement or consent judgment does not “conclude matters incident to the judgment that were no part of the cause of the action.” (*Ibid.* See also *Rappenecker v. Sea-Land Service, Inc.* (1979) 93 Cal.App.3d 256, 264 (*Rappenecker*).) Thus, if an accepted 998 offer is silent as to matters incident to the judgment, those matters may be recovered although the parties never mentioned or addressed them in the 998 offer.

Courts have routinely held costs and attorney fees to be matters incident to the judgment. (E.g., *Folsom, supra*, 32 Cal.3d at pp. 677-678; *Engle v. Copenbarger & Copenbarger* (2007) 157 Cal.App.4th 165, 168-169 (*Engle*); *Lanyi v. Goldblum* (1986)

177 Cal.App.3d 181, 187 (*Lanyi*);<sup>2</sup> *Rappenecker*, *supra*, 93 Cal.App.3d at p. 264.) Thus, even when an accepted 998 offer is silent as to costs and fees, the prevailing party may recover those items. (*Folsom*, *supra*, 32 Cal.3d at p. 681; *Engle*, *supra*, 157 Cal.App.4th at p. 168; *Lanyi*, *supra*, 177 Cal.App.3d at pp. 192-193; *Rappenecker*, *supra*, 93 Cal.App.3d at p. 264.)

In contrast with costs and attorney fees, prejudgment interest is not a matter incident to the judgment. Rather, contrary to Potter’s position here, courts have consistently held that prejudgment interest is an element of damages. (*Lineman v. Schmid* (1948) 32 Cal.2d 204, 208-209 [explaining that interest under section 3287 “is an element of damages provided by law. . . . Such interest is in the nature of damages.”]; *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 830 [“It is well established that prejudgment interest is not a cost, but an element of damages.”]; *Harris v. Northwestern National Insurance Co.* (1992) 6 Cal.App.4th 1061, 1067 [distinguishing costs and fees from prejudgment interest]; *Lawrence Tractor Co., Inc. v. Carlisle Insurance Co.* (1988) 202 Cal.App.3d 949, 955 [discussing “the inherent distinction between an award of interest and an award of attorney fees in a proper case. If allowable, interest is an element of damages provided by statute. [Citations.] Attorney fees, on the other hand, unless provided for by statute, are allowable only if specifically contracted for.”].)

Thus, because prejudgment interest is an element of damages and not a matter incident to the judgment, when an accepted 998 offer is silent on the issue of prejudgment interest, we conclude the offeror may not separately raise a claim for prejudgment interest. (See *Folsom*, *supra*, 32 Cal.3d at p. 677.) Accordingly, because the accepted 998 offers here are silent as to prejudgment interest, we hold that Potter has waived any right to claim prejudgment interest.

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<sup>2</sup> Respondent mistakenly claims *Lanyi* and *Ritzenthaler v. Fireside Thrift Co.* (2001) 93 Cal.App.4th 986 address prejudgment interest. Those cases address attorney fees, which, as noted above, is a matter incident to the judgment.

Potter's reliance on *Mendez v. Kurten* (1985) 170 Cal.App.3d 481 is misplaced. In *Mendez*, the defendant rejected the plaintiff's section 998 offer and the case went to trial, resulting in a verdict in favor of the plaintiff in excess of his 998 offer. (*Id.* at p. 484.) The issue was whether the plaintiff could recover interest under both Civil Code section 3291 and Code of Civil Procedure section 685.010, subdivision (a). (*Id.* at p. 484.) In concluding that he could not, the trial court assumed, without deciding, that interest under section 3291 is an element of damages. (*Id.* at p. 486.) Thus, *Mendez* does not address let alone decide the issue with which we are confronted.

In light of our conclusion, we need not reach the parties' remaining arguments.

### **Disposition**

The order is affirmed.

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CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.